

**MINUTES
of the
SECOND MEETING
of the
WATER AND NATURAL RESOURCES COMMITTEE**

**July 27-28, 2004
Board Room, Clovis Community College
Clovis**

The second meeting of the Water and Natural Resources Committee was called to order at 10:15 a.m. on Tuesday, July 27, 2004, by Senator Carlos R. Cisneros, vice chair.

PRESENT

Rep. Joe M Stell, Chair
Sen. Carlos R. Cisneros, Vice Chair
Sen. Sue Wilson Beffort
Rep. Joseph Cervantes
Rep. Dona G. Irwin
Rep. Brian K. Moore
Rep. Andy Nunez
Rep. Don Tripp
Rep. Robert White

Advisory Members

Rep. Ray Begaye
Rep. Anna M. Crook
Sen. Gay G. Kernan
Sen. Clinton D. Harden, Jr.
Rep. Peter F. Wirth

ABSENT

Sen. Joseph J. Carraro
Sen. Dede Feldman
Sen. Mary Jane M. Garcia
Rep. Larry A. Larranaga
Rep. James Roger Madalena
Sen. Mary Kay Papen
Sen. Shannon Robinson
Sen. H. Diane Snyder
Rep. Mimi Stewart

Sen. Timothy Z. Jennings
Rep. Rhonda S. King
Sen. Steve Komadina
Rep. Ben Lujan
Rep. Danice Picraux
Sen. Leonard Lee Rawson
Sen. Nancy Rodriguez
Rep. Henry Kiki Saavedra
Sen. Leonard Tsosie
Rep. Eric A. Youngberg

Staff

Jon Boller
Gordon Meeks
Jeret Fleetwood

Guests

The guest list is in the original meeting file.

Tuesday, July 27

Becky Riley, executive vice president of the Clovis Community College, and Tom Drake, assistant to the president, welcomed the committee to Clovis and to Clovis Community College.

Ray Mondragon, Clovis city manager, also welcomed the committee to Clovis.

COMMENTS ON STATE ENGINEER PROPOSED RULES

John D'Antonio, state engineer, and several members of his staff provided the committee with testimony regarding proposed active water resource management rules. Mr. D'Antonio began by noting that his authority to issue regulations governing water administration is clear. Section 72-2-9.1 NMSA 1978, enacted into law in 2003, expresses with some urgency the need for the state engineer to move forward with a plan for actively administering water allocations in accordance with water rights priorities. He stated that administration of water in New Mexico needs to be brought under one umbrella, rather than the current arrangement of water masters being created by four entities: federal courts, state courts, the Interstate Stream Commission and the Office of the State Engineer (OSE), and that the proposed rules should effectively do so. Mr. D'Antonio explained that his office will first develop general rules, to be supplemented by more extensive district-specific regulations. Water masters appointed by the state engineer will actually administer water rights in each of those specific districts. In developing the rules to this point, Mr. D'Antonio noted that his office has received a great deal of feedback from the public, which will help the OSE improve the rules, and that his office will continue to consult with the public in finalizing the general regulations and developing the district-specific regulations.

Mr. D'Antonio addressed many of the concerns about the proposed rules (see testimony below) expressed by a number of different communities of interest, including irrigation districts, acequias, municipalities, agriculture and those who question how the proposed rules will apply to them. In addressing those concerns, he discussed protection of senior water user rights; conjunctive administration of water rights and cooperative management with irrigation districts; the status of imported water; public welfare issues; due process protections for curtailed junior water users; replacement plans to provide a mechanism for immediate, temporary relief to junior users affected by priority administration; constitutional questions about the state engineer's authority to administer water rights absent a final adjudication of those rights; and appeals of water master and OSE decisions.

Steve Hernandez, an attorney representing Elephant Butte Irrigation District and Carlsbad Irrigation District, provided the committee with comments regarding the OSE's proposed rules. He applauded the OSE for trying to develop its rules, but observed that there are a number of potential problems with their practical application. First, he noted that the authority of water masters conflicts with state law providing irrigation districts with the authority to allocate and deliver water. For instance, he explained that an irrigation district's board of directors may allow members of the district to transfer water to other members, without the approval of the state engineer. He stated that placing that authority in the hands of a water master or the OSE creates a conflict. Mr. Hernandez also noted that many of the duties proposed for water masters are already performed by ditch riders and water masters that already exist. He

went on to raise concerns about budgeting for water masters, stating that water masters could completely duplicate functions performed by irrigation districts and charge water users for the same functions. Finally, Mr. Hernandez expressed concern about the lack of due process protection for water users under the OSE's proposed replacement plans.

Jay Stein, an attorney representing the El Prado Water and Sanitation District and the cities of Espanola, Las Cruces and Albuquerque, provided the committee with other concerns regarding the OSE's proposed rules. He explained that OSE approval of wells to divert ground water requires entities, such as those he represents, to put offsets back into the Rio Grande to counter the reduced flows. Mr. Stein pointed out that the proposed rules remain unclear on those offset requirements. He also noted that it is conceivable that the three cities he represents may have to use San Juan-Chama water to meet offset requirements, thereby making it unavailable for uses such as municipal drinking water. Mr. Stein suggested that the rules regarding stream systems should clearly outline their goals and that alternatives to active river management should be explored.

David Benavides of New Mexico Legal Aid expressed his concerns over the proposed OSE rules to the committee. He explained that the replacement plans proposed by the OSE rules are problematic in that the public is given little notice about the proposed transactions; that the state engineer is only required to review impairment to water users in a replacement plan; and that there are severely limited grounds for challenges. He also noted that the burden in a challenge would fall on the protester, not the applicant, as opposed to the burden currently being on the applicant.

A.J. Olsen, representing the Pecos Valley Artesian Conservancy District (PVACD), discussed his concerns over the proposed OSE rules with the committee. He first noted that PVACD's water administration is specified by a court decree and that the proposed rules would be in conflict with that decree. Mr. Olsen also stated that the proposed rules are vague, arbitrary and difficult for even trained water specialists to understand.

Janet Jarrat, a Valencia County farmer, outlined her concerns with the proposed OSE regulations. She explained that she believes the proposed rules are undermining the collaborative processes used by water users now. She also stated that water administration needs structure and guidance and should not be open-ended and unclear. Finally, Ms. Jarrat expressed her fear that senior water users could potentially be curtailed by a junior user under the direction of a water master or the OSE.

Mike White, representing the New Mexico Farm and Ranch Bureau, emphasized that his group supports the protection of water rights. Mr. White went on to question whether the proposed rules will protect the water rights of senior users.

Adrian Ogelsby, attorney for the Pueblo of Santa Ana, expressed his concerns over the proposed rules. He explained that the Pueblo of Santa Ana is really only answerable to federal law, and while the proposed rules have no applicability to the pueblo, it wishes to be good

neighbors. Mr. Ogelsby went on to voice his concerns over the lack of due process and public notice in the proposed rules. He also noted that the burden of producing a "clear and convincing" standard of evidence in appeals is nearly unattainable.

Len Stokes, representing the cities of Las Cruces and Alamogordo and Lea County water users, noted that changes in water administration will be difficult for everyone involved to accept and applauded the OSE for trying to better manage New Mexico's water supply. He also observed that in past years when New Mexico fell short of its compact deliveries, Texas took some time to prepare legal action against New Mexico. However, Mr. Stokes noted that it now appears that Texas is ready to pursue immediate legal action in the event of a shortfall, making it more important than ever that New Mexico take whatever steps it can to ensure that compact delivery obligations are met.

Mr. D'Antonio responded to the comments concerning the proposed rules and stated that his office would work diligently to address any misunderstandings or misconceptions regarding the proposed action. He assured the committee and water users that expedited transfers will not be allowed outside existing legal restraints and obligations. He said he would respond to written comments on the proposed rules submitted to his office.

Committee questions and comments related to:

- regulations as the backbone for administering water during a drought;
- public hearings on the proposed general rules as well as the specific regional rules;
- the water masters in place in San Juan County, Las Vegas, the lower Rio Grande, the Rio Gallinas and the Pojoaque Valley;
- the appropriation level for the Pecos River settlement, about \$40 million to date, and the need for \$30-\$50 million more, compared to a potential cost estimated at \$200-\$300 million of a priority call on the Pecos;
- the interaction of these proposed rules of the state engineer with the courts and the new supreme court rules in water adjudications;
- use of normal procedures for appeal;
- the need for users to act aggressively and affirmatively to protect their rights;
- conservation plans as components of regional plans and conformity of the new rules with regional plans and the state plan;
- status of water rights adjudications;
- quantification of the amount of water being used and the amount of water available in a given year;
- the power of a water master being given to classified employees and those employees' qualifications for that quasi-judicial authority;
- communications with irrigation and conservancy districts;
- setting a deadline for closing the comment period and adopting the regulations;
- and
- establishing a project management plan and a project review board.

DROUGHT TASK FORCE STATUS REPORT

Anne Watkins, special assistant to the state engineer, provided the committee with an update on the work of the governor's Drought Task Force (DTF). She explained that although New Mexico had received an above-normal amount of precipitation through the end of June, it would still take several years of normal or slightly above normal precipitation for the state to get back to normal reservoir levels. She also updated the committee on the water levels at the state's reservoirs, noting that most are below average and all are far below capacity. Ms. Watkins went on to summarize the drought plan developed in 2003 and the drought summit held in September 2003. She noted that another drought summit is planned for fall 2004, and that the intention is to focus on prevention of the catastrophic effects of drought; indicators of drought that can trigger management systems; water management; and project planning. Ms. Watkins also discussed some of the technology being developed to combat drought, including the use of water from brackish aquifers and desalination.

Questions and comments from the committee addressed:

- why the Water Trust Fund money is not being spent on the large regional projects that the fund was supposedly created for;
- the relationship of the Water Trust Board to the DTF and its work;
- the condition of habitat for endangered species;
- the cost-effectiveness of wellhead desalination;
- the status and financing for "urban defensible space projects", i.e., urban forest wildfire interface zones and forest and watershed improvement money;
- the cost of the drought to state agencies, such as state parks and the Department of Environment drinking water systems program; and
- general water management needs around the state in the foreseeable future and money to implement them.

PECOS RIVER SALT CEDAR REMOVAL STATUS REPORT

Debbie Hughes, director of the New Mexico Association of Conservation Districts, discussed efforts to remove salt cedars along river banks in New Mexico, particularly along the Pecos River. She outlined the funding sources for several salt cedar removal projects, noting that federal, state and local money has been contributed toward the various projects. Ms. Hughes also discussed the various means of salt cedar removal being employed, including biological, chemical and mechanical. Biological control consists of the use of goats in a pilot project along the Rio Grande and the use of the leaf beetle to eat salt cedars along the Pecos River. Chemical control involves spraying an herbicide such as Arsenal on salt cedars along the river banks from a helicopter. Ms. Hughes explained that since the herbicides attack enzymes that allow plants to grow, they are quite safe to animals and humans and have been approved by the federal Environmental Protection Agency (EPA) for direct application on water surfaces. Mechanical treatment is the process of physically removing salt cedars, either by the use of a machine that pulls the tree and roots out of the ground or by individuals with chainsaws simply cutting down the trees. Ms. Hughes discussed the acreage treated by each method and the success achieved by each method. She noted that, in most cases, each method requires re-treating the areas to remove

small patches of salt cedars that have begun to grow again. Finally, Ms. Hughes discussed whether the treatment of salt cedars along river banks actually leads to increased water flows. While she emphasized that more data is needed before a conclusion can be drawn, she did cite one example of increased flows being measured along a stretch of treated river where few other factors could have contributed to the increased amount of water in the river.

Questions and comments from the committee related to:

- how to determine what areas are aerial-sprayed and what areas are mechanically treated;
- relative effectiveness of the two treatments;
- percentage of water recovered that is owed to Texas from federal money used for salt cedar removal;
- monitoring and evaluating expenditures;
- cost per acre, \$200 per acre average;
- the lack of data on the cost benefit ratio for the amount of water saved per dollar spent on eradication;
- use of Arsenal herbicide and its safety;
- the participation of a public health specialist to work on the Interagency Coordinating Task Force;
- the amount of spraying on private land; and
- the number of goats used and the extent of livestock used for salt cedar suppression in the long term.

A motion was made, seconded and unanimously approved to adopt the minutes of the June 24-25 meeting.

The committee recessed at 3:40 p.m.

Wednesday, July 28

UTE PIPELINE PROJECT

Scott Verhines, Ute Pipeline project manager, Orlando Ortega, mayor of Portales, and Darrel Bostwick, chairman of the Ute Water Commission, provided the committee with testimony regarding the status of the Eastern New Mexico Rural Water System (ENMRWS). They explained that the ENMRWS is a project designed to meet the water use needs of the eastern-central New Mexico communities and counties and Cannon Air Force Base. They stated that the project was first conceived almost 40 years ago and that the need for it has increased rather than diminished. The group explained that the concept for the ENMRWS involves technically simple but administratively complex plans to build a pipeline to deliver water from Ute Reservoir to the area's communities. They outlined the funding needs for their project in terms of federal, state and local money, noting that they had recently testified before a congressional committee about federal funding issues. They emphasized that they are seeking 80 percent of the money from the federal government and 10 percent each from the state and

local governments participating in the project.

Questions and comments from the committee related to:

- the possibility for federal funding;
- the federal Bureau of Reclamation's lack of support for a federal-state matching ratio of 80 to 20 percent rather than 65 to 35;
- alternative costs and financing packages for financing the 10 percent local cost share;
- the precedent set for an 80/20 matching federal/state funding formula in other major regional water projects around the country;
- the amount of money sought from the state, more than \$31 million over 10-11 years;
- escalation of costs for every year of no progress;
- viability of issuing industrial revenue bonds or adding gross receipts tax and other options to finance the project;
- nature of the delivery system from the lake, trunk pipeline 18 to 54 inches to the caprock with three pump stations, a water treatment plant and 180 miles of distribution lines;
- the potential use of wind energy for powering the pumps;
- water rights total of 24,000 acre-feet from Ute Reservoir;
- the current anticipated use level of the various participating communities;
- the first delivery planned for 2012; and
- the project is not affordable without state and federal subsidies.

GROUND WATER REGULATION

Representative Earlene Roberts discussed the existence of an "undeclared" water basin on the east side of New Mexico in Roosevelt County. She explained that increased drought awareness in the area has forced people to look around at water options, and the presence of a basin outside of the jurisdiction of the OSE has raised concerns about the amount of water available to them. She said that nothing illegal was going on, but that she felt it was important to protect all water users.

Pat Clifton, a resident of southern Roosevelt County, explained that dairies in the area have increased the demand for feed crops. Consequently, land that has never been tilled is now being put into production and irrigated, which in turn places a large demand on limited water resources. He expressed a need to at least register and monitor the irrigation wells, since there is currently no limit on the amount of use from wells in the area.

A motion was made, seconded and unanimously approved by the committee to send a letter to the state engineer asking him to appear before the committee in August to clarify the issue of undeclared basins.

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITTING PROGRAM

Charles Lundstrom and Derrith Watchman-Moore, both of the New Mexico Department of Environment (NMED), provided the committee with testimony regarding the federal National Pollutant Discharge Elimination System (NPDES) permit program. They explained that NPDES was created by the federal Clean Water Act to control water pollution by regulating, through a permitting process, point sources that discharge pollutants into waters of the United States, and that while individual homes do not require permits, industrial, municipal and other facilities do. Mr. Lundstrom and Ms. Watchman-Moore explained that permits are issued by either authorized states or the EPA, and that a state may be authorized by instituting a permitting program that is either as stringent as, or more stringent than, federal permitting regulations. They also noted that 45 of the nation's 50 states have been authorized, while New Mexico is still required to deal with the EPA's office in Dallas, Texas.

Mr. Lundstrom and Ms. Watchman-Moore explained to the committee that NMED is seeking changes to the state's Water Quality Act that would allow it to become authorized and take over the permitting process. They outlined the process by which existing permit holders would simply be re-authorized by the state instead of the EPA, noting that becoming an authorized state will likely cost New Mexico about \$1.3 million.

Questions and comments from the committee addressed:

- the availability of a draft bill;
- whether state regulation would differ from the way EPA is administering the program; Mr. Lundstrom said the state would not change the compliance requirements;
- how existing permits would stay in place and as they expire they would be renewed by the state; and only those permits that are out of compliance anyway would have problems with the state, according to the speakers;
- opposition from some permittees over the fees the state would impose;
- why now, why change, who's complaining about the current status?;
- the underground storage tank "corrective action fund";
- the number of vacancies in the department and how that relates to the proposed new program;
- use of existing staff and efficiency improvements in department administration;
- frustration over fees and money going into the general fund rather than being used to pay for the permit program that the fees were originally created to pay for;
- Navajo regulatory primacy;
- the number of existing NPDES permits; approximately 120 individual permits and 2,500 facilities are under general NPDES permits;
- the appeal process over enforcement actions; and
- the term of a permit.

PUBLIC COMMENT

Randy Traynor, New Mexico Home Builders Association (NMHBA), said fines are serious. The NMHBA tries to help its membership comply. The EPA has been reasonable partly because its permits are issued over the Internet. No one has disputed the water quality standards per se, but the regulated community needs to know that the NMED is going to be able to assume EPA authority seamlessly and not create new problems. There are thousands of sites to be affected by this change. Questions such as "how is it going to be run?", "how will it be staffed?", "how much professionalism will be exercised?" need to be answered.

John Horton, director of policy for commercial general contractors, said that companies receive permits for their operations, which require plans. He said that many industries are potentially affected by the regulations, including agriculture and even the state Department of Transportation. He said his organization wants input in drafting the legislation and in developing rules for the enforcement process.

Questions and comments from the committee addressed:

- why it is necessary to amend the Water Quality Act; and
- the status of the Water Quality Control Commission and its sunset date.

HYDROLOGY OF THE SACRAMENTO MOUNTAINS

Rick Baish, representing the Otero Soil and Water Conservation District, discussed dwindling water resources in communities near the Sacramento Mountains, such as Cloudcroft, noting that currently little is known about how the Sacramento Mountains function hydrologically. He explained that area communities have been talking with New Mexico Tech about better understanding the hydrology of the mountains, particularly in terms of watershed health and what becomes of the precipitation that falls in the area.

Other members of the affected communities, including Mike Nivison, Dan Abercrombie and Eddy Vigil, discussed the need to study the hydrology of the area to try to maximize the limited water resources. They also noted that, for communities such as Cloudcroft, the question is not if they will run out of water, but when. Finally, they stated that studies alone will not help the water situation, that funding is needed for both studying the water resources of the Sacramento Mountains and for bringing the forests back to health, which will provide more water and limit fire danger.

The committee asked the group about the feasibility of getting funding through a mill levy, but they explained that, even if such a measure were to pass, Otero County contains large amounts of federal land, meaning that there is a very small amount of taxable land and it likely would not produce adequate funding.

Other questions and comments related to:

- how much money is being sought, \$1.3 million through New Mexico Tech's Bureau of Geology and Mineral Resources;
- money available from the federal Department of Agriculture;

- the capacity for soil and water conservation districts to get mill levies adopted by the voters;
- the time span for the study and phasing of the project; and
- the potential for Sandia National Laboratories' tax credit program for technical assistance.

The committee adjourned at 12:10 p.m.